UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC and
MARTIN AFFILIATED, LLC,

Plaintiffs

vs.

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT,

Defendants.

Case No. 2:07-CV-13164
Honorable Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

_____________________________________/

DEFENDANTS AFTERMATH RECORDS' AND APPLE INC.'S EVIDENTIARY OBJECTIONS IN SUPPORT OF DEFENDANTS' REVISED MOTION FOR SUMMARY JUDGMENT

Daniel D. Quick
Dickinson Wright PLLC
38525 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48304
(248) 433-7200
dquick@dickinsonwright.com
P48109

Kelly M. Klaus
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071-1560
(213) 683-9238
kelly.klaus@mto.com

Attorneys for Defendant

5908967.1

6145194.1

Dockets.Justia.com

A. OBJECTIONS TO EXHIBIT A - DECLARATION OF RICHARD BUSCH

Portions of Busch Declaration	Defendants' Objections
"Attached hereto as **Exhibit 19** is a true and accurate copy of the Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords, being (Docket 2006-3, CRB DPRA) which relevant pages I retrieved from the official website of the U.S. Copyright Royalty Board, www.loc.gov/crb, and which is referenced in Plaintiffs' Memorandum of Law and/or other papers filed contemporaneously herewith." Exh. A, Busch Decl., ¶18 at 4-5	Defendants object to the admission of Exhibit 19 on the ground of relevance. This document does not appear to be referenced in Plaintiffs' memorandum of law or any other pages submitted with the Opposition. Defendants further object on the ground that neither the document nor the Busch Declaration identify when the document was accessed on the Internet, so it is objectionable as unauthenticated and unidentified as the thing it purports to be. Fed. R. Evid. 901(a).
"Attached hereto as **Exhibit 20** is a true and accurate copy of relevant pages retrieved from the official website of the U.S. Copyright Office, http://www.copyright.gov/docs/section115, entitled "Mechanical and Digital Phonorecords Compulsory License, Scope of the Section 115 license," which are referenced in Plaintiffs' Memorandum of Law and/or other papers filed contemporaneously herewith." Exh. A, Busch Decl., ¶19 at 5	Defendants object to the admission of Exhibit 20 as irrelevant, unreliable, unauthenticated, and unidentified because it does not appear to be the document Plaintiffs claim it to be. Fed. R. Evid. 901(a). Although Plaintiffs cite the Exhibit as containing a particular piece of quoted language, see Opp. at 9, the document included as Exhibit 20 does not appear to be the document identified in either the Opposition or the Busch Declaration ¶ 19. Rather, it appears to be a different page printed from the Copyright Office website that does not contain the quoted language. Further, the document is improperly authenticated because Plaintiffs' counsel does not say when the document was accessed on the Internet.
"Attached hereto as **Exhibit 22** is a true and accurate copy of the relevant pages of Senate Report 104-208 in support of Public Law No. 104-39, 109 Stat. 336, Legislative history associated with the revisions to 17 U.S.C. § 115, expressing clear	Defendants object to the admissibility of Plaintiffs' counsel's testimony in ¶ 21 as to the meaning of the legislative history attached as Exhibit 22. The document speaks for itself.

Portions of Busch Declaration	**Defendants' Objections**
Congressional intent that controlled composition clauses were made inapplicable to DPDs by the enactment of 17 U.S.C. 11 5(c)(3)(E)(i), which are referenced in Plaintiffs' Memorandum of Law and/or other papers filed contemporaneously herewith." Exh. A, Busch Decl., ¶21 at 5	
"Attached hereto as **Exhibit 23** is a true and accurate copy of the relevant pages of the defendants' opposition to the plaintiff's motion for summary judgment in *Reinhardt v. WalMart*, No. 07 Civ. 8233 (SAS), 2008 U.S. Dist. LEXIS 32119 (S.D.N.Y Apr. 18, 2008) which I retrieved through PACER at the official site for the United States District Court for the Southern District of New York, which are referenced in Plaintiffs' Memorandum of Law and/or other papers filed contemporaneously herewith." Exh. A, Busch Decl., ¶22 at 4-5	Exhibit 23 is inadmissible hearsay. It consists of an unsworn, out-of-court statement, namely a legal brief from a subsequent incarnation of a case cited by Defendants, that Plaintiffs submit for the truth of the matter contained within it. *See* Fed. R. Evid. 801(c), 802.
"Attached hereto as **Exhibit 24** is a true and accurate copy of the relevant pages of Farber, 9 *Entertainment Industry Contracts* ¶ 168-01 at 168-3 (2007) and Farber, 8 *Entertainment Industry Contracts*, 159-140.11, Form 159-3 at 159-140.38, ¶ 8 (2007), including the relevant pages of the so-called "Paterno Form" Recording Contract credited in that treatise as "The World's Greatest, Most Sensible and Versatile Exclusive Recording Artist Agreement." Such pages are referenced in Plaintiffs' Memorandum of Law and/or other papers filed contemporaneously herewith." Exh. A, Busch Decl., ¶23 at 6	Defendants object to the admissibility of Exhibit 24 as irrelevant, unreliable, unauthenticated and unidentified because it is not the document Plaintiffs purport it to be. *See* Fed. R. Evid. 901(a). Exhibit 24 does not consist of the pages from this text that the Busch Declaration purports it consists of. In particular, there are no pages 159-140.11, Form 159-3 at 159-140.38, ¶ 8, and no reference to the so-called "Paterno Form."

Portions of Busch Declaration	**Defendants' Objections**
"Attached hereto as **Exhibit 26** is a true and accurate copy of the relevant pages of Shemel & Krasilovsky, *This Business of Music* (10th Ed., 2007) which are referenced in Plaintiffs' Memorandum of Law and/or other papers filed contemporaneously herewith. These pages supersede and replace the 5th Edition, 2005 of Shemel & Krasilovsky, *This Business of Music* which Defendants attach as Ex. 4a, being Doc. No. 34-6, pages 1-4. The inexact, incorrect language in Defendants' exhibit from a 23-year old edition of the book (that controlled composition clauses "covers the terms of a mechanical license issued to a record company by a copyright proprietor. . .") was expressly omitted from later editions of *This Business of Music*, and clearly is not in the most recent 2007 edition." Exh. A, Busch Decl., ¶25 at 6	Defendants object to the admissibility of Plaintiffs' counsel's testimony as to the purpose of the revision of the text because Plaintiffs' counsel lacks foundation and lacks personal knowledge as to the matters on which he is testifying. Mr. Busch does not know which pages of the text "supersede and replace" others.

B. OBJECTIONS TO EXHIBIT B - DECLARATION OF JOEL MARTIN

Portions of Martin Declaration	**Defendants' Objections**
"Attached hereto as **Exhibit 1** is a true and accurate copy of the November 28, 1995 Exclusive Recording Agreement between F.B.T. Productions and Marshall Bruce Mathers III, professionally known as Eminem ("Eminem"). F.B.T. Productions is the production company headed up by Mark and Jeff Bass, who discovered Eminem. I have been the managing agent of F.B.T. since its formation. Pursuant to this agreement, Eminem granted to F.B.T. 100% of each composition he wrote during the term of the agreement. Thus, Eminem	Defendants object to the testimony of Mr. Martin in paragraph 2, and to the admission of Exhibit 1 as likely to confuse the issues. Fed. R. Evid. 403. The testimony is incomplete and inaccurate because Mr. Martin does not acknowledge the subsequent amendment to this production agreement, which decreased the copyright interest assigned from Eminem to FBT from 100% to 50%. LeMoine Decl. Ex. I.

Portions of Martin Declaration	**Defendants' Objections**
does not control or have the right to license any of the Eminem Compositions." Exh. B, Martin Decl., ¶2 at 2	
"Attached hereto as **Exhibit 2** is a true and accurate copy of the March 9, 1998 Agreement ("1998 Agreement") between F.B.T. Productions furnishing the services of Eminem to Aftermath Entertainment. This document is referred to as a "short form" agreement. The Long Form Agreement referenced on page 1 was never drafted or executed. Neither Plaintiff was a signatory to the 1998 Agreement." Exh. B, Martin Decl., ¶3 at 2	Defendants object to Mr. Martin's testimony contained in paragraph 3 as irrelevant and/or likely to confuse the issues. Fed. R. Evid. 403, 404. While neither Plaintiff entity "Eight Mile Style LLC" nor "Martin Affiliated LLC" were signatories to the 1998 Agreement, the affiliated LLC "F.B.T. Productions, Inc." was a party to that agreement. These LLCs have the same members: Mark Bass and Jeff Bass. They have the same managing agent: Joel Martin.
"Attached hereto as **Exhibit 4** is a true and accurate copy of the July 2, 2003 Agreement ("2003 Agreement") between Aftermath Records and Eminem. The 2003 Agreement also is a "short form" agreement. The Long Form Agreement referenced on page 1 was never drafted or executed. Neither Plaintiff was a signatory to the 2003 Agreement. I signed the 2003 Agreement individually as an income recipient only. I was deemed to be a third party beneficiary of the 2003 Agreement. Jeff Bass signed the 2003 Agreement on behalf of F.B.T. Productions, LLC, a passive income participant entitled to receive a share of certain royalties, fees and/or advances. By the terms of the 1998 and 2003 Agreements, Aftermath became the owner of the master sound recordings performed and recorded by Eminem." Exh. B, Martin Decl., ¶5 at 2-3	Defendants object to Mr. Martin's testimony in paragraph 5 as inadmissible because it lacks foundation and states a legal conclusion as to Mr. Martin's and F.B.T.'s role in the 2003 Agreement. Defendants further object to Mr. Martin's testimony as to the document's content. The document speaks for itself.
"Plaintiff Eight Mile Style, LLC was formed to serve as the publishing company	Defendants object to the admission of Exhibit 6 on the ground that it was never

6145194.1

Portions of Martin Declaration	**Defendants' Objections**
affiliated with F.B.T. Productions, the company headed by Mark and Jeff Bass. Attached hereto as **Exhibit 6** is a true and correct Eight Mile Style's operating agreement, effective as of April 19, 2000. In forming Eight Mile, the Basses granted it 100% of their ownership interests in all compositions and copyrights to such compositions that they owned, which included the compositions they owned, as F.B.T., pursuant to the November 28, 1995 Exclusive Recording Agreement described above." Exh. B, Martin Decl., ¶7 at 3	produced in discovery in this matter until it was attached as Exhibit 6 to Mr. Martin's declaration. As such, this Exhibit should be excluded because Plaintiffs failed to provide it during the discovery period. See Fed. R. Civ. Proc. 37. Defendants further object to Mr. Martin's testimony as to the document's content. The document speaks for itself.
"Mark and Jeff Bass are professional songwriters, producers and musicians. Pursuant to two agreements signed April 18, 2001, each of the Basses agreed to render their exclusive services as writers to Eight Mile, and they transferred a 50% interest in their interest in each composition written pursuant to the agreement to Eight Mile. In addition, they named Eight Mile as their exclusive administrator, giving Eight Mile the exclusive right, among other things, the grant and issue licenses in "Compositions" under the agreement. True and correct copies of the Writer-Co-Publisher Agreements between Mark Bass and Eight Mile and between Jeff Bass and Eight Mile, respectively, are attached hereto as **Exhibit 8** and **Exhibit 9**." Ex. B, Martin Decl., ¶9 at 4	Defendants object to the admission of Exhibits 8 and 9 on the ground that they were not produced during the discovery period in this action, and, indeed, were not produced at all until August 28, 2008, the day Plaintiffs' Opposition was filed. As such, these Exhibits should be excluded because Plaintiffs failed to provide them during the discovery period. *See* Fed. R. Civ. Proc. 37. Defendants further object to Mr. Martin's testimony as to the documents' content. The documents speak for themselves.
"Louis Resto d/b/a Resto World Music ("Resto") is a professional songwriter who often works with, among others, Jeff Bass, Mark Bass, and Eminem. Resto is a co-writer on several of the Eminem Compositions at issue in this case. Resto	Defendants object to the admission of Exhibit 10 on the ground that it was not produced during the discovery period in this action, and, indeed, was not produced at all until August 28, 2008, the day Plaintiffs' Opposition was filed. As such, this Exhibit

Portions of Martin Declaration	**Defendants' Objections**
entered into a writer and exclusive administration agreement with Eight Mile on January 9, 2003, a true and correct copy of which is attached hereto as **Exhibit 10**. Pursuant to this agreement, Eight Mile is granted a 50% interest in compositions written under the agreement, and is named as the exclusive administrator for such compositions. Schedule A to the agreement is a list of compositions to which, notwithstanding anything to the contrary in the agreement, exclusive publishing rights are granted to Eight Mile. This list includes several compositions at issue in this case." Exh. B, Martin Decl., ¶10 at 4	should be excluded because Plaintiffs failed to provide it during the discovery period. See Fed. R. Civ. Proc. 37. Defendants further object to Mr. Martin's testimony as to the document's content. The document speaks for itself.
"Resto subsequently entered into two amendments to the January 9, 2003 agreement, on April 1, 2004 and October 19, 2004, which listed a number of additional compositions that were to be considered "Compositions" under the January 9, 2003 agreement, and in which Eight Mile would accordingly have a 50% ownership rights and 100% exclusive administration rights. True and correct copies of these amendments, and the copyright assignments accompanying them, are attached hereto as **Exhibit 11** and **Exhibit 12**, respectively." Exh. B, Martin Decl., ¶11 at 4-5	Defendants object to the admission of Exhibit 11 and 12 on the ground that they was not produced during the discovery period in this action, and, indeed, was not produced at all until August 28, 2008, the day Plaintiffs' Opposition was filed. As such, these Exhibits should be excluded because Plaintiffs failed to provide them during the discovery period. *See* Fed. R. Civ. Proc. 37. Defendants further object to Mr. Martin's testimony as to the document's content. The document speaks for itself.
"Steve King ("King") is a professional songwriter who often works with, among others, Jeff Bass, Mark Bass, and Eminem. King is a co-writer on several of the Eminem Compositions at issue in this case. King entered into a writer and exclusive administration agreement with Eight Mile on January 9, 2003, a true and correct copy of which is attached hereto as **Exhibit 13**.	Defendants object to the admission of Exhibit 13 on the ground that it was not produced during the discovery period in this action, and, indeed, was not produced at all until August 28, 2008, the day Plaintiffs' Opposition was filed. As such, this Exhibit should be excluded because Plaintiffs failed to provide it during the discovery period.

Portions of Martin Declaration	Defendants' Objections
Pursuant to this agreement, Eight Mile is granted a 50% interest in compositions written under the agreement, and is named as the exclusive administrator for such compositions. Schedule A to the agreement is a list of compositions to which, notwithstanding anything to the contrary in the agreement, exclusive publishing rights are granted to Eight Mile. This list includes several compositions at issue in this case." Exh. B, Martin Decl., ¶12 at 5	*See* Fed. R. Civ. Proc. 37. Defendants further object to Mr. Martin's testimony as to the document's content. The document speaks for itself.
"King subsequently entered into two amendments to the January 9, 2003 agreement, on April 1, 2004 and October 19, 2004, which listed a number of additional compositions that were to be considered "Compositions" under the January 9, 2003 agreement, and in which Eight Mile would accordingly have a 50% ownership rights and 100% exclusive administration rights. These amendments, and the copyright assignments accompanying them, are attached hereto as **Exhibit 14** and **Exhibit 15**, respectively." Exh. B, Martin Decl., ¶13 at 5	Defendants object to the admission of Exhibits 14 and 15 on the ground that they was not produced during the discovery period in this action, and, indeed, were not produced at all until August 28, 2008, the day Plaintiffs' Opposition was filed. As such, these Exhibits should be excluded because Plaintiffs failed to provide them during the discovery period. *See* Fed. R. Civ. Proc. 37. Defendants further object to Mr. Martin's testimony as to the document's content. The document speaks for itself
"Attached hereto as **Exhibit 16** is a true and accurate copy of Schedule 1 identifying each of the Eminem Compositions, the album on which it appears, the copyright registration number for the composition and the names of the copyright owners, also known as copyright claimants, of the Eminem Compositions. Eminem is an author or co-author of all of the compositions except "Many Men" which was written by Darrell Branch, Luis Resto, Curtis Jackson, professionally known as 50 Cent, and Tavares. True and accurate	Defendants object to the admission of Exhibit 17 as misleading and likely to confuse the issues. Fed. R. Evid. 403. Plaintiffs claim exclusive control over several compositions, at least two of which were registered to another entity, Ensign Music Publishing, with whom Plaintiffs contracted to be a co-publisher. LeMoine Decl. Ex. G (copyright registrations to Ensign for "Hailie's Song" and "Cleaning Out My Closet", included within Exhibit G in alphabetical order).

Portions of Martin Declaration	Defendants' Objections
copies of the copyright registrations for all of the Eminem Compositions at issue in this action were attached to the Complaint as Exhibit A. Of the 93 compositions at issue, Martin and Eight Mile own 100% of 22 Eminem Compositions as set forth on **Exhibit 17** attached hereto, and own the remainder of the compositions with the music publishers identified on Exhibit 16. As exclusive administrator of these compositions, as described above, only Eight Mile has the right to license those compositions to others." Exh. B, Martin Decl., ¶14 at 5-6	Defendants further object on the ground that the statement that "Eight Mile is the exclusive administrator of these compostions" is misleading and likely to confuse the issues. Fed. R. Evid. 403. Eight Mile has recently acknowledged that it is not the "exclusive administrator" for the Eminem Compositions, as it claims here. See LeMoine Decl. Ex. Q (exclusive administration agreement between Eight Mile and Music Resources, Inc.)
"Just as Eight Mile is the exclusive administrator for the individuals discussed above, most other songwriters also have administrators. Based on my business dealings with the co-writers of the Eminem Compositions, I understand that most or all of them do in fact work through administrators who have exclusive administration rights to all songs written by these co-writers. For instance, I understand that Andre Young, professionally known as Dr. Dre, is administered by Warner/Chappell Music Group. Co-writers with such exclusive administration agreements do not have any authority to grant licenses to the Eminem Compositions; instead, their administrators would." Exh. B, Martin Decl., ¶15 at 6	Defendants object to Mr. Martin's testimony in paragraph 15 as inadmissible because it lacks foundation and lacks personal knowledge as to the relationships of any of the co-writers with any music publishers or administrators. Mr. Martin's "understanding" is nothing more than a guess and, without actual evidence, cannot create an issue of fact to defeat summary judgment. Defendants further object on the ground that the statement that "Eight Mile is the exclusive administrator of these compostions" is misleading and likely to confuse the issues. Fed. R. Evid. 403. Eight Mile has recently acknowledged that it is not the "exclusive administrator" for the Eminem Compositions, as it claims here. See LeMoine Decl. Ex. Q (exclusive administration agreement between Eight Mile and Music Resources, Inc.)
"There was no way to tell from these statements whether UMG was sending any revenue to Eight Mile as a result of DPDs. No configuration is identified as a DPD on	Defendants object to Mr. Martin's testimony as misleading and likely to lead to confusion of the issues. Fed. R. Evid. 403. Plaintiffs simultaneously received

Portions of Martin Declaration	**Defendants' Objections**
the glossary forms UMG would send, nor was any "sales type." In the course of this lawsuit, I learned that UMG purported to use the configuration code "ID" and the undefined sales type "OTHR" to indicate DPD sales, including permanent downloads through defendant Apple. Looking back, the overwhelming majority of the revenue in these royalty statements was attributable to sales of physical product. For example, in Exhibit 18, approximately $2000 out of a total of nearly $185,000 appears to be attributable to items of the "ID" configuration. Of course, due to the inscrutable nature of the codes there is and was no way to tell just what these "ID" items are and whether they are in fact unauthorized permanent downloads or something else that is, in fact, an authorized use. Plaintiffs had no knowledge that the royalty payments we received contained monies for DPDs we specifically refused to authorize." Exh. B, Martin Decl., ¶22 at 8-9	artist royalty statements on behalf of their affiliated LLC, F.B.T. Productions. Concurrent with their submission of this testimony in their declaration, Plaintiffs have submitted evidence in the California action demonstrating that they had access to precisely the information in the artist royalty statements that they claim to have been confused by in the publishing royalty statements. LeMoine Decl. Ex. O.
"In light of the Mastertone License, and the DPD license for "Lose Yourself' above, Plaintiffs expected to receive some income for digital uses. We were unaware that the "OTHR" and "ID" categories on the royalty statements discussed above included permanent downloads of other Eminem Compositions for which we consistently refused to grant DPD licenses until we had an audit conducted in 2006." Exh. B, Martin Decl., ¶24 at 9	Defendants object to Mr. Martin's testimony as misleading and likely to lead to confusion of the issues. Fed. R. Evid. 403. Plaintiffs simultaneously received artist royalty statements on behalf of their affiliated LLC, F.B.T. Productions. Concurrent with their submission of this testimony in their declaration, Plaintiffs have submitted evidence in the California action demonstrating that they had access to precisely the information in the artist royalty statements that they claim to have been confused by in the publishing royalty statements. LeMoine Decl. Ex. O.
"Attached hereto as **Exhibit 25** is a list of	Defendants object to the testimony in

Portions of Martin Declaration	**Defendants' Objections**
the 55 compositions in this case that, to the best of my knowledge, were released in 2003 or more recently. Since **Apple's** iTunes service began offering music in 2003, some or all of these compositions were likely simultaneously to the public for the first time in both physical configurations and DPDs." Exh. B, Martin Decl., ¶27 at 10	paragraph 27 and to Exhibit 25 as lacking foundation and lacking personal knowledge as to whether the compositions listed were released to the public at the same time in physical and DPD configurations. Defendants further object on the ground that the evidence is irrelevant to any of the issues presented in this Revised Motion.
"I have reviewed the defendants' memorandum wherein they imply I said in deposition that the Mechanical Royalties paragraph operated as an "agreement to agree" to issue DPD licenses. I did not say this. While I did state that this paragraph operated as an agreement to agree, I did not mean that it would compel Eight Mile to grant a license in digital product. I explicitly stated that I thought Eight Mile would only be compelled to grant a license if certain conditions were met. My understanding is that this paragraph does not apply to DPDs at all." Exh. B, Martin Decl., ¶28 at 10	Defendants object to Mr. Martin's testimony as improper in that it attempts to create a fact question through a contradictory assertion in an affidavit. At his deposition, Mr. Martin testified that the controlled composition clause constituted an "agreement to agree," and Plaintiffs' counsel clarified that this applied to digital uses as well. Ex. 8b, 320:15-322:23. Martin cannot create a fact question by submitting a contradictory affidavit in opposition to a summary judgment motion. *Sparks v. Wal-Mart Stores, Inc.*, 361 F. Supp. 2d 664, 669-70 (E.D. Mich. 2005).

C. OBJECTIONS TO EXHIBIT C - DECLARATION OF PATRICK SULLIVAN

Portions of Sullivan Declaration	**Defendants' Objections**
"Certain paragraphs of my expert report [attached as Exhibit 1, see Sullivan Decl. ¶ 1], incorporated herein by reference, are referred to and cited within Plaintiffs' Brief in Opposition to the Defendants Revised Motion for Summary Judgment filed	Defendants object to the admission of Sullivan's expert report as inadmissible hearsay. *See* Fed. R. Evid. 801(c), 802. It consists of an unsworn, out-of-court statement Plaintiffs submit for the truth of the matter contained within it.

Portions of Sullivan Declaration	**Defendants' Objections**
simultaneously with this Declaration." Exh. C, Sullivan Decl., ¶2 at 2	
"Attached hereto as **Exhibit 2** is a summary chart of some of the proffered "licenses" submitted by Defendants in support of their Revised Motion together with my opinion regarding the invalidity of those proffered documents as purported licenses for the Eminem Compositions under question here. These supposed "licenses" must either: not be licenses at all; not be licenses to either one of the Defendants; or simply not be DPD licenses. Mechanical licenses and DPD licenses are non-exclusive licenses and, without the consent of the copyright owners, are not transferable or assignable inasmuch as such licenses convey only a grant of rights (a personal right) and not any ownership (property) rights in the copyright. Thus, if the purported licensee on the proffered "licenses" is any party other than Defendant Aftermath Entertainment doing business as Aftermath Records, a joint venture or Defendant Apple, Inc., the proffered "license" is expressly not a license to these Defendants. In those instances where the proffered "license" purports to authorize DPD exploitation of a co-owner's share of an Eminem Composition, but recordings of that composition have not yet been commercially released, the "first use" of that composition must be authorized by ***all*** copyright owners, including Plaintiffs. Defendants failed to identify which of the works were "first use" works, but it is likely that "first use" compositions include any composition which was first released on an album and made available on iTunes since the launch of iTunes in April 2003."	Defendants object to the admission of Sullivan's Exhibit 2 as inadmissible hearsay. *See* Fed. R. Evid. 801(c), 802. It consists of an unsworn, out-of-court statement Plaintiffs submit for the truth of the matter contained within it. Defendants further object on the ground that Exhibit 2 is not properly authenticated or identified, and is not what the witness purports it to be. Fed. R. Evid. 901(a). Sullivan testified that it does not contain, as the declaration states, his "opinion regarding the invalidity of those proffered documents as purported licenses for the Eminem Compositions under question here." Rather, Mr. Sullivan testified that one would have to go through each mechanical license and, presumably, ask Mr. Sullivan to determine what his opinion was as to that specific license's validity. LeMoine Decl. Ex. A (Sullivan Depo. Tr. 324:25-325:24; 356:24-358:19). Defendants further object on the ground that Mr. Sullivan lacks foundation for the testimony included in Paragraph 3 and the accompanying Exhibit 2. Defendants further object on the ground that Paragraph 3 and the accompanying Exhibit 2 constitute improper expert testimony because they consist of legal conclusions—namely, whether the licenses submitted are valid for the challenged use. *See Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994).

Portions of Sullivan Declaration	**Defendants' Objections**
Exh. C, Sullivan Decl., ¶3 at 2-3	
"In any instance in which Defendants proffer a controlled composition clause as the equivalent to a DPD license, that argument is invalid. Controlled compositions clauses are explicitly not allowed for digital phonorecord deliveries (DPDs) and thus cannot operate as a DPD license. Further, an author or co-author of a musical composition may not license the composition where the author or co-author has transferred his copyright interest to a music publisher. Based upon the documents provided by Defendants, this appears to have happened in virtually all instances. In these cases, the author no longer has the ability to license the works; that ability resides with the music publisher alone. In those instances where the musical compositions are co-published but the exclusive right to administer the compositions has been assigned to a third party publisher, that co-owner/co-publisher likewise has no authority to license the musical compositions which it no longer controls. Further, the controlled composition clauses upon which Defendants rely are in set forth in contracts between third party recording artists and record labels other than Defendant Aftermath, the joint venture, or Defendant Apple. For example, Exhibit C-1 to the Declaration of Rand Hoffman is an agreement between Shady Records, Inc. and the group D-12 and its individual members with Exhibit C-2 being an agreement between Shady Records, Inc. furnishing the services of (f/s/o) D-12 and Interscope Records, a California general partnership. Attached hereto as **Exhibit 3** is a summary chart of the agreements Defendants attach to the	Defendants object to the admission of Sullivan's Exhibit 3 as inadmissible hearsay. *See* Fed. R. Evid. 801(c); 802. It consists of an unsworn, out-of-court statement Plaintiffs submit for the truth of the matter contained within it. Defendants further object on the ground that Mr. Sullivan lacks foundation for the testimony included in Paragraph 4 and the accompanying Exhibit 3. Mr. Sullivan testified that he does not know whether the artists in question transferred their rights to an exclusive administrator. LeMoine Decl. Ex. A (Sullivan Depo. Tr. 432:23-436:23). Rather, he relied for this point on Plaintiffs' counsel, Mr. Levinsohn, and Mr. Martin's representations that the co-authors had exclusively transferred their rights, but Mr. Sullivan stated he "couldn't know unless [he saw] those contracts" whether that was true. *Id*. at 436:21-22; *see also id*. at 439:17-439:22. Defendants further object on the ground that the testimony in Paragraph 4 and the accompanying Exhibit 3 lack foundation as to whether the agreements consist of licenses to Aftermath, and as to whether there has been any assignment or transfer. Sullivan testified that he did not know whether the contracting parties in his Exhibit 4 are affiliated with Aftermath, nor did he know whether there had been any transfer or assignment between those parties. LeMoine Decl. Ex. A (Sullivan Depo. Tr. at 456:3-464:14) Defendants further object on the ground that Paragraph 4 and the accompanying Exhibit

Portions of Sullivan Declaration	Defendants' Objections
Declaration of Rand Hoffman as Exhibits 5A through Exhibit 5E which was prepared by Plaintiffs' counsel. Even if these controlled composition clauses could be considered licenses for DPDs, which they cannot, these third party controlled composition clauses cannot constitute a license to either of the Defendants to the extent the agreement is with a party other than either Defendant since, as mentioned in paragraph 3, such non-exclusive licenses are not transferable or assignable by the licensee." Exh. C, Sullivan Decl., ¶4 at 3	3 constitute improper expert testimony because they consist of legal conclusions—namely, whether the controlled composition clauses submitted are valid for the challenged use. *See Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994).
"Defendants also submit that plaintiffs mistakenly listed musical compositions more than once on its list of infringed compositions, being Revised Schedule 1 since "these single compositions require only one license for their distribution." (Doc. No. 66-3 at 1.) This statement is flatly erroneous. When a license is issued for a musical composition, publishers require the licensee to be specific as to which recorded products their compositions will appear, and issue a separate license for each product, even if the recording is the same. Furthermore, as discussed more fully in Exhibit 1, my report, at pages 7-11, it is industry practice that separate licenses are issued for physical product and for DPDs. A "mechanical" license authorizes the mechanical reproduction and distribution of physical configurations while a DPD license authorizes the reproduction and delivery of an ephemeral copy of the sound recording by means of a digital transmission. DPDs are not covered in a standard mechanical license unless the license expressly provides that it does. A license identifies one	Defendants object to the admissibility of this testimony, to the extent this paragraph incorporates Sullivan's expert report, which is inadmissible hearsay. *See* Fed. R. Evid. 801(c), 802. Defendants object to this testimony as inadmissible on the ground that it lacks foundation and does not refer to the terms of a specific license. Defendants further object to this testimony as irrelevant. Plaintiffs' claim of infringement of their copyrights in the compositions are not multiplied by the number of albums on which each particualr composition appears. Rather, Plaintiffs have a single claim of infringement for each single composition they claim has been infringed, regardless of whether the alleged infringement has taken place in the inclusion of the composition in sound recordings on one album or multiple albums. This evidence is relevant, if at all, to a claim for damages, which is not at issue in this motion.

Portions of Sullivan Declaration	**Defendants' Objections**
particular recording of the copyrighted work as performed by a specific artist on a specified album, generally identified by the "Record Number" assigned by the record label and/or UPC number (Uniform Product Code). Thus, for example, a license for plaintiffs' compositions "Cleaning Out My Closet" and "Without Me" must identify the album and record number and/or UPC number upon which it appears because one license does not cover all uses of a particular composition." Exh. C, Sullivan Decl., ¶5 at 4	Defendants further object on the ground that this paragraph constitutes improper expert testimony because it consists of legal conclusions—namely, whether the copyright law requires separate licenses for physical and digital configurations. *See Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994).
"Defendants produced no licenses for "Cleaning Out My Closet" which appears on at least two different albums in this action, *The Eminem Show and Curtain Call*, each of which such albums requires a separate physical configuration license and separate DPD licenses. "Without Me" appears on the same two albums; however, Defendants rely upon a single purported "license" from Bug Music for both albums. (Doc. No. 66-3 at 2, #17 and at 4, #49.) A review of the proffered document (Doc. No. 62, "Without Me," License/License Request Summary, AFT0058531-532) reveals on the face of the document, "Note: This is a summary of information only and is not a license." The summary also indicates that HFA does not represent 52.92% of the composition as that is controlled by non-HFA publishers on whose behalf HFA cannot grant a license. (See Exhibit 1, Report at 9.) Importantly, the summary indicates that "Without Me" appears on *The Eminem Show* (*Explicit Version*), UMG record number 894932902, UPC number 609949329020, released in May 2002 which is unqualifiedly an album	Defendants object to the admissibility of this testimony, to the extent this paragraph incorporates Sullivan's expert report, which is inadmissible hearsay. *See* Fed. R. Evid. 801(c), 802. Defendants object to this testimony as inadmissible on the ground that it lacks foundation as to what rights Bug Music, Inc. intended to convey. Defendants further object to this testimony as irrelevant. Plaintiffs' claim of infringement of their copyrights in the compositions are not multiplied by the number of albums on which the compositions appear. Rather, Plaintiffs have a single claim of infringement for each single composition they claim has been infringed, regardless of whether the alleged infringement has taken place in the inclusion of the composition in sound recordings on one album or multiple albums. This evidence is relevant, if at all, to a claim for damages, which is not at issue in this motion. Defendants further object on the ground that

Portions of Sullivan Declaration	Defendants' Objections
different than *Curtain Call – The Hits* which was released in December 2005." Exh. C, Sullivan Decl., ¶6 at 4-5	this paragraph constitutes improper expert testimony because it consists of legal conclusions -- namely, whether the license for "Without Me" issued by Bug Music authorizes the use Plaintiffs claim is infringing. *See Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994).
"With respect to the proffered "licenses" in Section I (third party "licenses") and Section II (HFA Summary of Licenses/License Request Summary") of **Exhibit 2**, each such document, even if effective as a license, which they are not, are specifically limited to the territory of the United States and in one instance, to the United States, its territories and possessions. In researching the availability of the Eminem Compositions through iTunes, I found that the Eminem Compositions have been reproduced and distributed worldwide by Apple through its iTunes Store. The Apple iTunes Store shows that its music is available in 61 countries worldwide ranging from Argentina to Viet Nam. Attached hereto as collective **Exhibit 3(a) through 3(e)** are printouts from the Apple iTunes Store in the United States, the United Kingdom, France and Germany, the latter denoted "Deutschland" at the iTunes Store. These print-outs are representative of the availability of the Eminem Compositions worldwide, including both as entire albums for sale at the price of $9.99 in the United States and individual songs for sale at the price of 99 cents each. As my expert report states, the vast majority of mechanical and DPD licensing outside of the US is handled directly through rights societies who act on behalf of all publishers within one territory. In the cases of the UK, France, and Germany, each territory has one or more	Defendants object to the admissibility of this testimony, to the extent this paragraph incorporates Sullivan's expert report, which is inadmissible hearsay. *See* Fed. R. Evid. 801(c), 802. Further, Exhibits 3(a) through 3(e) are also inadmissible hearsay under the federal rules. Defendants object to this testimony in paragraph 7 and the accompanying Exhibits 3(a) through 3(e) on the ground that it lacks foundation. Mr. Sullivan testified that he did not know whether foreign exploitation rights had been obtained from foreign collecting rights societies. LeMoine Decl., Ex. A (Patrick Sullivan Depo. Tr., 464:19-469:20). Defendants further object to the testimony offered in paragraph 7 and the accompanying Exhibits 3(a) through 3(e) on the grounds of relevance. Foreign exploitation rights are not at issue in this case, so it is irrelevant whether the rights were granted in the licenses submitted by Defendants. Defendants further object on the ground that this paragraph constitutes improper expert testimony because it consists of legal conclusions — namely, whether the licenses submitted by Defendants encompass foreign exploitation. *See Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994).

Portions of Sullivan Declaration	**Defendants' Objections**
society representing mechanical and DPD rights, among other publisher rights. Online retailers in these territories obtain licenses from the societies and pay royalties directly into the societies, without interacting directly with the local publishers. In order for Defendants to be legally distributing compositions in those territories, they must show proof that proper licensing arrangements have been made with all proper local societies in every territory where Plaintiffs' compositions are available for sale." Exh. C, Sullivan Decl., ¶7 at 5-6	
"With respect to the "licenses" proffered in Section III of **Exhibit 2**, each such document appears to have been prepared by Universal Music Group, is entitled "Mechanical License Notification and Confirmation" and sent to Universal Music Publishing Group for a Universal publisher or a Universal-administered publisher pursuant to controlled composition clauses between certain recording artists and various record labels. These Notices cannot be considered licenses at all, as they lack nearly all of the material terms that should constitute a license. They lack provisions for accountings, audits, territory specification, and term specification, among others. Neither are these Notices in accordance with compulsory licensing procedures set forth in Section 115 of the Copyright Act. With two exceptions, each Notification and Confirmation was issued by Todd Douglas of UMG Recordings, Inc. The other two Notifications, being Bates Numbers AFT0058592 and AFT0058695, were prepared by Leo Ferrante on behalf of UMG Recording, Inc. To the extent any	Defendants object to the testimony offered in paragraph 8 on the ground that it lacks foundation and assumes facts not in evidence. None of the licenses referred to in this paragraph were issued pursuant to a controlled composition clause. Defendants further object to the testimony offered in paragraph 8 on the ground that it lacks foundation as to which licenses are subject to challenge based on the date of the Aftermath Joint Venture agreement. The paragraph does not specify which licenses are subject to this argument. Defendants further object on the ground that this paragraph constitutes improper expert testimony because it consists of legal conclusions—namely, whether these licenses from Universal Music's publishing arm contain requisite terms to constitute a valid license. *See Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994).

Portions of Sullivan Declaration	**Defendants' Objections**
such Notifications and Confirmations were issued pursuant to recording contracts with Interscope Records, Inc., Interscope Records, a California General Partnership, Shady Records, Inc. Shady/Aftermath Records, Shady/Interscope Records, Aftermath/Interscope Records or G-Units Records, such Notifications do not constitute licenses to Defendants herein for several reasons: (1) the controlled composition clauses which purport to license the compositions for DPDs are inapplicable to DPDs by statute; (2) co-authors, recording artists, producers, production companies and labels cannot grant licenses for musical compositions they do not control and Defendants have produced no documents that any of the co-authors, recording artists, producers, production companies or labels control any share of the Eminem Compositions as issue; (3) even if a grant of a license could be found, non-exclusive licenses are not transferable or assignable without the copyright owner's consent, which consent has not been produced by Defendants. In addition, where Defendants rely upon the 2005 Joint Venture Agreement with Dr. Dre as set forth in Doc. No. 66-3, Exhibit 1b, pages 2-8 ("applied by Aftermath JVA"), this document cannot constitute a license pursuant to a controlled composition clause to the extent the Eminem Compositions were released as DPDs prior to the December 9, 2005 execution of the agreement." Exh. C, Sullivan Decl., ¶8 at 6-7	

D. OBJECTIONS TO EXHIBIT D - DECLARATION OF HOWARD ABRAMS

Portions of Abrams Declaration	Defendants' Objections
"Certain paragraphs of my expert report, incorporated herein by reference, are referred to and cited within Plaintiffs' Brief in Opposition to Defendants~ Revised Motion for Summary Judgment filed contemporaneously herewith." Exhibit D, Abrams Decl., ¶3 at 2	Defendants object to the admission of Abrams' Expert Report as inadmissible hearsay. *See* Fed. R. Evid. 801(c), 802. It consists of an unsworn, out-of-court statement Plaintiffs submit for the truth of the matter contained within it.
"The transaction between Apple Computer, Inc. ("Apple") and Universal Music Group ("UMG") which resulted in copies of the sound recordings at issue in this litigation residing on Apple's servers for further dissemination to the public is not a sale under the terms of the Uniform Commercial Code ("UCC"). Section 2-106(1) of the UCC provides: "A 'sa1e' consists of the passing of title from the seller to the buyer for a price." Under the agreements between Apple and the Universal Music Group ("UMG") title did not pass to Apple with respect to the sound recordings UMG authorized Apple to place on App1e's servers. Rather, UMG retained ownership and title to the recordings only authorizing Apple to make and disseminate copies to the public, through its Itunes program." Exhibit D, Abrams Decl., ¶4 at 2	Defendants further object on the ground that this paragraph constitutes improper expert testimony because it consist of legal conclusions — namely, what the legal character is of the transaction between Apple and UMG. *See Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994).

E. OBJECTIONS TO EXHIBIT E - DECLARATION OF TIM HERNANDEZ

Portions of Hernandez Declaration	Defendants' Objections
"Through those interactions, while I was	Defendants object to the admission of Tim

Portions of Hernandez Declaration	Defendants' Objections
working at Interscope, I became aware that Eight Mile Style ("Eight Mile") objected to its compositions being made available by UMG for digital download, or other online exploitations, and Eight Mile was not executing digital download licenses being sent to it by UMG. One person I specifically remember speaking to about this was Todd Douglas, who told me that Eight Mile was not executing permanent download licenses, and was objecting to its compositions being made available for digital exploitations. Through my conversations on this subject, while I was at Interscope, it was apparent to me that Eight Mile's objections in this regard were known by those in the department dealing with the issue." Ex. E, Hernandez Decl., ¶3 at 2	Hernandez in this paragraph as inadmissible hearsay. *See* Fed. R. Evid. 801(c); 802. Hernandez recounts conversations with Todd Douglas and other unnamed UMG employees, which are unsworn, out-of-court statement Plaintiffs submit for the truth of the matters contained within them. Mr. Douglas's out-of-court statement is not subject to any exception; Mr. Douglas has no authority to speak on behalf of UMG. Defendants further object on the ground that this testimony is vague, conclusory and irrelevant because no time period is specified for when Mr. Hernandez "became aware that Eight Mile Style . . . objected to its compositions being made available by UMG for digital download," nor is a time period specified for the alleged conversation with Todd Douglas. Defendants further object on the ground that this testimony lacks foundation and is vague and conclusory regarding what was "apparent to [Mr. Hernandez]," without specifiying how it became apparent to Mr. Hernandez, that Eight Mile's objections were "known by those in the department dealing with the issue."

s/Daniel D. Quick
Daniel D. Quick
Dickinson Wright PLLC
38525 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48304
(248) 433-7200
dquick@dickinsonwright.com
P48109
Attorneys for Defendants

Kelly M. Klaus
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071-1560
(213) 683-9238
kelly.klaus@mto.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the all counsel.

Kelly M. Klaus
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071-1560
(213) 683-9238
kelly.klaus@mto.com